No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the pre-emption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, pre-empts all state laws having a reference to or connection with airline rates, routes, or services?

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief *amicus curiae* in support of petitioner, American Airlines.[1] The Chamber is the largest federation of businesses, trade and professional associations and state and local chambers of commerce in the world. The Chamber represents over 220,000 businesses and organizations, with substantial membership in each of the 50 states. A significant function of the Chamber is to represent the interests of its

[1] Both petitioner and respondents have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

members in important matters before this Court, the lower courts, the Congress, Executive Branch, and independent regulatory agencies of the federal government. Consequently, the Chamber has sought to advance those interests by filing briefs in this Court in cases of importance to the business community. *E.g., Livadas v. Aubry*, No. 92-1920; *Honda Motor Co. v. Oberg*, No. 93-644.

The Chamber's members have long supported federal pre-emption in a variety of subject matters in which conflicting state laws make operating interstate businesses a difficult and burdensome task. *E.g., Lingle v. Magic Chef*, 486 U.S. 399 (1988) (NLRA pre-emption); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (ERISA pre-emption); *Gade v. National Solid Wastes Management Assoc.*, —— U.S. ——, 112 S. Ct. 2374 (1992) (OSHA pre-emption). Congress clearly intended for the uniform and exclusive federal regulation of the nation's airlines when it passed the Airline Deregulation Act of 1978, 49 U.S.C. App. §§ 1301 *et seq.* (the "Deregulation Act"). The question presented in this case—whether the Airline Deregulation Act pre-empts the application of state common law and statutory consumer fraud damages actions—is of great concern to the Chamber's members because it would signal a return to the conflicting state regulations that business has traditionally opposed.

The Illinois Supreme Court's narrow interpretation of the Deregulation Act's pre-emption statute represents a dangerous departure from the Act. Like ERISA's pre-emption statute, to which it is closely analogous, the Deregulation Act's pre-emption statute requires a broad and expansive reading. To do otherwise threatens the settled body of pre-emption law, and places airline companies at a renewed risk of re-regulation and conflicting state laws.

STATEMENT OF THE CASE

The Chamber incorporates by reference the summary contained in Petitioner's brief.

SUMMARY OF ARGUMENT

The Airline Deregulation Act of 1978, 49 U.S.C. App. §§ 1301 *et seq.*, a landmark piece of legislation, deregulated an industry that since its inception had been heavily regulated by the federal government and the states. In order to achieve its goal, Congress included in the Deregulation Act a broad pre-emption statute, designed to insure that the states would not undo federal deregulation with regulation of their own. Thus, Congress appropriately chose to pre-empt all state laws "relating to" airline rates, routes, or services. In doing so, Congress mirrored the "relate to" language from the Employee Retirement Income Security Act.[2]

Two terms ago this Court decided on the breadth of the pre-emption statute, and gave it a broad interpretation. *Morales v. Trans World Airlines, Inc.*, —— U.S. ——, 119 L.Ed.2d 157 (1992). The Court noted its similarly to ERISA's pre-emption statute, and consequently drew upon many decided ERISA cases for guidance in interpreting the phrase. The Court concluded the phrase "relate to" has a broad meaning, consistent with the decided ERISA cases.

Notwithstanding the decision in *Morales*, the Illinois Supreme Court has stubbornly refused to find that state actions seeking damages for "retroactive" modifications to an airline's frequent flyer program are pre-empted. In the court's view, actions seeking statutory or contract damages have only a "slight connection" with rates, routes, or services, and in any event frequent flyer programs are not "essential elements" of airlines. Nowhere in the *Morales* decision, or any of the previously decided

[2] 29 U.S.C. § 1144(a).

ERISA cases interpreting the very same language, is there such a test. The Chamber urges this Court to recognize that the Illinois Supreme Court's decision is inconsistent with decided case law and must be reversed.

ARGUMENT

THE ILLINOIS SUPREME COURT'S DECISION IS AN UNWARRANTED AND UNNECESSARY DEPARTURE FROM SETTLED AIRLINE DEREGULATION ACT AND ERISA PRE-EMPTION LAW.

The question in this case is whether Illinois' consumer fraud act and common law breach of contract actions directed at the rates and services offered through American Airline's frequent flyer program are pre-empted by the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1).[3] The respondents seek to have the Court hold that causes of action seeking monetary damages for modifications to an airline's frequent flyer program do not "relate to" an airline's rates, routes, or services. As a practical matter, the respondents are asking the Court to turn its back on a well-settled body of law and re-examine a pre-emption statute whose meaning is clear. The Chamber believes the facts of this case do not warrant such a re-examination.

Congress recognized in enacting the Deregulation Act that pre-empting state laws was necessary to insure "the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, —— U.S. ——, 119 L.Ed.2d 157, 164 (1992). Congress' goal of airline deregulation would obviously have

[3] "Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.", 49 U.S.C. App. § 1305(a)(1).

been frustrated if conflicting state laws were not pre-empted by the Deregulation Act, but the vast body of existing federal regulation was eliminated.[4] Accordingly, the Deregulation Act includes a pre-emption statute whose language is broad and encompasses all state laws "having a connection with or reference to airline rates, routes, or services. . . ." *Morales*, 119 L.Ed.2d at 167-68.

Irrespective of the plain meaning of the Deregulation Act's pre-emption clause, the Illinois Supreme Court has completely misconstrued Congress' intent. The court has seized upon a narrow exception in *Morales*—that some state actions may affect airline rates, routes, or services in too tenuous a manner to have pre-emptive effect—that now threatens to swallow the rule. The Chamber urges this Court to recognize that if the Illinois decision is upheld, other states will be encouraged to re-regulate in a field Congress has clearly designated as appropriately federal subject matter. This, in turn, may result in a narrower reading of other statutes containing broad pre-emption language.

The Chamber also urges reversal of the Illinois decision because the pre-emption statute employs the very same operative language as the Employee Retirement Income Security Act's (ERISA) pre-emption clause.[5] This Court has made it amply clear that the phrase "relate to" has a settled meaning in ERISA pre-emption cases; for consistency in statutory interpretation and predictability it should not have one meaning in ERISA cases and a different meaning in airline deregulation cases.

[4] The overall breadth of the Deregulation Act is one indicator of the requirement for a comprehensive pre-emption statute. For example, the Deregulation Act did away with the Civil Aeronautics Board. 49 U.S.C. App. § 1551.

[5] 29 U.S.C. § 1144(a).

A. The Deregulation Act Pre-emption Statute Is Deliberately Expansive and Commands a Broad Interpretation.

The Airline Deregulation Act was passed in the belief that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality . . . of air transportation services." *Morales*, 119 L.Ed.2d at 164. Congress could not have accomplished its goal of eliminating the threat of conflicting and inconsistent state regulation without exempting all state laws relating to rates, routes, and services from state regulation. As the Fifth Circuit noted in a related case to *Morales*, "Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states." *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir. 1990). Thus, Congress included in the Deregulation Act a pre-emption clause whose "ordinary meaning . . . is a broad one." *Morales*, 119 L.Ed.2d at 167.

The issue in *Morales* was whether guidelines developed by the National Association of Attorneys General (NAAG) and adopted by seven states, which prohibited allegedly deceptive airline fare advertisements, were pre-empted by the Deregulation Act. The majority had no trouble in making such a finding. In doing so, *Morales* noted the similarities in language between the Deregulation Act's pre-emption statute and ERISA's pre-emption statute. In both statutes the key operative phrase is "relate to." Exactly because the statutes are so similar, Justice Scalia recognized the need for consistent interpretation in *Morales*:

> "Since the relevant language of the ADA [Airline Deregulation Act] is identical [to ERISA's pre-emption language], we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline rates, routes, or services are pre-empted under 49 U.S.C. § 1305(a)(1)." 119 L.Ed.2d at 167-68.

The "connection with or reference to" language in *Morales* is not unique to *Morales*; instead, the Court drew upon many earlier ERISA pre-emption cases. *E.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

As in ERISA pre-emption cases, "pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales*, 119 L.Ed.2d at 167. When Congress' command is explicit, as in this case, the court's task is made that much simpler. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97. Despite respondents' arguments, there is no good reason for believing Congress intended a narrow pre-emption clause in this area.

The *Morales* Court defined the phrase "relate to" by reference to decided ERISA cases. The "breadth of [the Act's] pre-emptive reach is apparent from its language." *Morales*, 119 L.Ed.2d at 167, *quoting Shaw, supra*, 463 U.S. at 96. It should be accorded an "expansive sweep." *Id., quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). It has a "broad scope," *Id., quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). It is "broadly worded," *Id., quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990), and "conspicuous for its breadth," *quoting FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).[6]

It is thus clear the pre-emption statute must be accorded an expansive interpretation. No other interpreta-

[6] In a recent ERISA pre-emption case decided after *Morales*, the Court held a broad interpretation "is true to the ordinary meaning of relate to, see Black's Law Dictionary 1288 (6th ed. 1990) and thus gives effect to the deliberately expansive language chosen by Congress." *Dist. of Columbia v. Greater Washington Bd. of Trade*, 121 L.Ed.2d 513, 520 (1992), *quoting Pilot Life, supra*, at 46. That is the only reading that the pre-emption clause supports.

tion is consistent with Congress' intent or the body of decided ERISA cases interpreting the very same language. In this case, however, the Illinois Supreme Court has simply chosen to re-affirm its pre-*Morales* decision. This does great harm to the integrity of *Morales* and the many cited ERISA cases, and must not be countenanced.

B. Reaffirming the *Morales* Test for Pre-emption Is Necessary to Preserve the Settled Body of ERISA Pre-emption Decisions.

Despite the statute's clear meaning, the Illinois Supreme Court has severely restricted *Morales*, and thus harmed the well-settled body of decided ERISA cases. In its opinion, state "laws that had only a slight connection to an airlines' rates, routes, or services, would not be preempted by section 1305(a)(1)." App. at 5a.[7] That is, if the airline program is not an "essential element to the operation of an airline," it is not to be pre-empted. App. at 6a. Nowhere in *Morales*, or the closely analogous ERISA pre-emption cases, is there the notion that state actions with a "slight connection" to "non-essential elements" are not pre-empted. The only exception to the broad pre-emption rule are actions that are too tenuous, remote or peripheral. *Morales*, 119 L.Ed.2d at 172, *quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100, n.21. The Illinois court is simply wrong in arguing that the exception applies in this case.[8] Further, the very limited exception stated in *Morales* is not a basis upon which the "essential elements" test can rest. In light of the vast body of precedent interpreting the phrase "relating to,"

[7] References cited as "App. at ——" are references to Petitioner's Petition for a Writ of Certiorari.

[8] In *Morales*, the Court used as examples of state laws that are too tenuous laws prohibiting gambling and prostitution as applied to airlines. *Morales*, 119 L.Ed.2d at 171-72. There is a quantum difference in relatedness between laws that prohibit the acts mentioned above, and contract or tort actions awarding damages for modification of a frequent flyer program.

there is no justification for now departing from the *Morales* decision and the ERISA cases it relied on.

The *Morales* decision also makes it abundantly clear that § 1305(a)(1) does more than simply pre-empt "the States from actually prescribing rates, routes, or services." That argument, the Court said, "simply reads the words "relating to" out of the statute." *Morales*, 119 L.Ed.2d at 168, *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). The problem with the "essential element" requirement proffered by the Illinois court is that it commits exactly that offense. In *Morales*, the NAAG guidelines taken together would have "establish[ed] binding requirements as to how tickets may be marketed if they are to be sold at given prices." *Morales*, 119 L.Ed.2d at 170. In the case at bar, awarding damages for an airline's modification of its frequent flyer program "effectively creat[es] an enforceable right to [a] fare. . . ."[9] *Morales*, 119 L.Ed.2d at 170. There was simply no discussion of "essential elements" in *Morales*, and there should be none.

The *Morales* decision also addressed the "utterly irrational" notion that only state laws specifically addressed to the airline industry are pre-empted. Drawing specific reference to ERISA cases, the Court stated "A state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Morales*, 119 L.Ed.2d at 169, *quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990). Nonetheless, the Illinois court reasoned that "[a] frequent flyer program is not

[9] The Ninth Circuit has also run afoul of this problem. In *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993) (US app pndg) the court held that West's state contract and tort law actions against Northwest for overbooking a flight were not pre-empted by the Deregulation Act. Despite a vigorous dissent, the court held that the actions were too tenuously related to rates, routes, or services. This decision, like the case at bar, is wrong and threatens to undo Congress' deregulation goals.

an essential element to the operation of an airline. Indeed, the airline industry functioned successfully for decades prior to providing incentives to its travelers in the form of frequent flyer programs." App. at 6a. By the court's reasoning, any technological or marketing development in the airline industry may be excepted from the pre-emption statute either because it is non-essential or because it came about after the Deregulation Act was passed. This view of the pre-emption clause is "utterly irrational."

A similar argument was rejected in the ERISA pre-emption case, *FMC Corp. v. Holliday*, 498 U.S. 52, 58-59 (1990). Here the Court held that "to interpret the [ERISA] pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA. . . would be incompatible with the provision's legislative history. . . . These were rejected in favor of the present language in the Act, indicating that the section's pre-emptive scope was as broad as its language." Thus, whether or not airline frequent flyer programs are "essential" or are specifically dealt with in state law is simply irrelevant to a proper pre-emption analysis. It does not seem logical that, applying the very same language and reasoning, there can be different results in this case than *FMC Corp.*

As the Court stated in another ERISA pre-emption case, *Metropolitan Life*, the Illinois causes of action "bear[] indirectly but substantially" on airlines, for if the decision is upheld, airlines will have to tailor their frequent flyer programs to the laws of the 50 states or risk being subject to actions like this one.[10] *Metropolitan Life*,

[10] The following description of the dangers of conflicting state laws, as Justice Blackmun noted in the ERISA case *Shaw v. Delta Air Lines, Inc.*, is equally on point here:

> "An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult. . . . ERISA's comprehensive pre-emption of state law was meant to minimize [] interference with the administration of employee benefit plans."

Shaw, 463 U.S. at 105, n.25.

Justice Blackmun's reasoning applies just as strongly in this case. There is no doubt that both consumers and airlines benefit as a result of frequent flyer programs. If the Illinois court's decision is upheld, and differing or conflicting state laws are not pre-empted, the important goals of furthering efficiency, innovation, low prices, variety and quality of air transportation services, will be at risk.

471 U.S. 724, 739. Indeed, as petitioners explain, Illinois has already become the forum of choice for plaintiffs' frequent flyer suits against the airlines. App. at 11.

It is precisely because this Court has equated the Deregulation Act's pre-emption statute with ERISA's, that any departure from the *Morales* decision is also a departure from the well-settled body of ERISA pre-emption cases. The respondents would not dare to suggest that ERISA's pre-emption statute does not pre-empt state laws with only a "slight connection" or that are "non-essential" to employee benefit plans. Nonetheless, the Court must be wary of upholding the Illinois court's decision, using as a basis the very same language in the Deregulation Act as is found in ERISA.

Because the decision of the Illinois Supreme Court threatens the well-settled body of ERISA decisions this Court has created, and because the *Morales* decision is consistent with those cases, the Chamber respectfully urges the Court to reverse the decision.

CONCLUSION

The decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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